"Document" is defined in Order 12 rule 1 to include summons, notice, order and other process and a written communication, unless there is something repugnant in the context.

In my judgment, it is clear that Order 25 rule 13(2) requires that notice of the defendant/respondent's application must be served on the plaintiff/appellant. It is also clear that this notice is, by virtue of the definition of "document" in Order 12 rule 1, a document. It is also clear that Order 12 rule 3 governs the mode of service of any document which is required to be served on any person where no other mode of service is prescribed by any statute or rule.

In my judgment, the plaintiff/appellant being a party acting in person, ought to have been served in one of the three modes provided in Order 12 rule 3(1)(b). It follows therefore that the 2nd Civil District Judge ought to have set aside the instalment order made by the 3rd Civil District Judge. The appeal is allowed with costs and there will be an order that the instalment order made by the 3rd Civil District Judge in Apprication No. 3567 of 1968 be set aside.

Appeal allowed.

Solicitors: *Advani & Hoo; Pillai & Co.*

IN RE FAIR INSURANCE CO. LTD.

[O.C.J. (Raja Azlan Shah J.) May 13, 1969]

[Kuala Lumpur—Companies Winding Up No. 44 of 1962]

Companies — Voluntary winding up — Winding up subject to supervision of court — Power of court to remove liquidators — Companies Ordinance, 1940-1946, ss. 183, 242, 251.

In this case the company was being voluntarily wound up by liquidators appointed by the company. Subsequently it was ordered that the winding up of the company be continued but subject to the supervision of the court and liquidators were appointed by the court. The applicants applied to remove the liquidators appointed by the court on a number of grounds. They also applied for an additional liquidator.

Held: (1) the court had no power to remove the liquidators under any provision of the Companies Ordinance;

(2) the court had power to appoint an additional liquidator but in the circumstances and as no useful purpose could be served by the appointment, the court would not exercise its discretion to do so.

COMPANIES WINDING UP.

N. Sharma for the applicants.

D.G. Rawson for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application by Yap Phan Kooi and Saw Yew Bee who are the only contributories and directors of Fair Insurance Co. Ltd. which is hereinafter referred to as "the company".

The company was incorporated in 1961 under the Companies Ordinance, 1940-1946. On the coming into force of the Life Assurance Act, 1961, the directors decided to wind up voluntarily. Accordingly, the company went into voluntary winding up on 22nd February, 1962. Yap Hong Thin and V. Kandiah were appointed liquidators.

On 7th May, 1962 Arthur Clarence Gracy, the competent authority under section 8 of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 petitioned that (1) the company be wound up by the court under the provisions of the Companies Ordinance, 1940-1946, and the Life Assurance Companies (Compulsory Liquidation) Act, 1962; (2) Anthony Niblock, Philip Gerald Grundy, Francis Neale Mugliston, Norman Davies Wood and John Arnold Howard of Evatt & Co., Kuala Lumpur be jointly and severally appointed liquidators of the company. On 28th May, 1962, Suffian J. (as he then was) ordered that the voluntary winding up of the company be continued but subject to the supervision of the court. It was further ordered that Anthony Niblock, Philip Gerald Grundy, Francis Neale Mugliston, Norman Davies Wood and John Arnold Howard be jointly and severally appointed liquidators in place of Yap Hong Thin and V. Kandiah. John Arnold was later discharged.

On 19th June, 1964, Yap Phan Kooi and Saw Yew Bee applied by way of summons in chambers for the determination of the following questions: (1) whether the liquidators should wind up the affairs of the company as in an ordinary voluntary winding up and/or whether the provisions of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 apply to the winding up; (2) whether policy holders of the company whose policies had lapsed before the coming into operation of the Life Assurance Act, 1961 should still be regarded as creditors of the company; (3) on what basis should those persons whose policies did not lapse on 15th October, 1961 be paid; (4) how should the validity of the claims received by the liquidators be ascertained and whether some representatives of the contributories or the creditors or some other independent person should be associated in the inspection and determination of the validity of such claims. On 15th December, 1964, Gill J. (as he then was) ordered that: (1) the provisions of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 applied to the winding up of the company; (2) policy-holders of the company whose policies had lapsed before the coming into

operation of the Life Assurance Companies (Compulsory Liquidation) Act, 1962 were not creditors of the company; (3) those persons whose policies did not lapse on 15th October, 1961 were to be paid an amount equal to the aggregate of the premiums paid and claimed by them under the policies; (4) the validity of the claims received by the liquidators was to be ascertained by the liquidators alone. The applicants then appealed against the answer to question (4). On 6th September, 1965 the Federal Court upheld the answer of Gill J. to question (4)*.

Coming now to the present application, the applicants, Yap Phan Kooi and Saw Yew Bee, on 21st September, 1965 applied for an order that: (1) Anthony Niblock, Philip Gerald Grundy, Francis Neale Mugliston and Norman Davies Wood be removed and Lim Seng Guan of Ipoh or such competent person be appointed as liquidator as the court considers fit; (2) alternatively, Lim Seng Guan be appointed as liquidator in addition to Anthony Niblock; (3) a committee of inspection be appointed as provided in the Companies Ordinance, 1940-1946. Prayer (3) was later abandoned by the applicants.

It is the gist of the appellants' complaints that the liquidators appointed by the court had failed: (1) to observe certain statutory provisions of the Companies Ordinance, 1940-1946; (2) to apply themselves with the diligence and care expected of them; (3) to maintain the impartial balance between the interests of the claimants and that of the contributories.

As for the removal of the liquidators, counsel for the applicants relied on section 183(1), section 242(2) and section 251(3) of the Companies Ordinance, 1940-1946. Section 183(1) provided that: "(1) A liquidator appointed by the court may resign or, on cause shown, be removed by the court." Section 242(2) provided that: "(2) The court, may on cause shown, remove a liquidator and appoint another liquidator." Section 251(3) provided that: "(3) The court may remove any liquidator so appointed by the court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal, or by death or resignation."

Counsel for the respondents contended that none of the sections which counsel for the applicants relied on for the removal of the respondents was applicable in the circumstances of the case. After deliberation, I arrived at the same conclusion.

Counsel for the applicants first relied on section 183(1) of the Companies Ordinance. That section was inapplicable by reason of section 252 of the same Ordinance which provided: "(2) A winding up subject to the supervision of the court is not a winding up by the court for the purpose of the provisions of this Ordinance which are set out in the Ninth Schedule to this Ordinance but, subject as aforesaid, an order for a winding up subject to supervision shall for all purposes be deemed to be an order for winding up by the court." The Ninth Schedule bore the heading: "Provisions which do not apply in the case of a winding up subject to supervision of the court." Section 183 other than sub-section (5) was included in the list of provisions in the Ninth Schedule which were inapplicable to a winding up subject to the supervision of the court. By the order of the court dated 28th May, 1962 the winding up of the company was to continue but subject to the supervision of the court. Hence, section 183(1) which counsel sought to rely on was in fact inapplicable to the liquidation of the company since it was subject to the supervision of the court.

Counsel for the applicants next relied on section 242(2) of the Companies Ordinance. This section was one of the sections mentioned in section 239 of the same Ordinance. Section 239 provided that "The provisions contained in the eight sections of this Ordinance next following shall apply to every voluntary winding up whether a members' or a contributors' winding up." Since the winding up of the company was one subject to the supervision of the court, by section 252(2) of the Companies Ordinance it was deemed a winding up by the court. As section 242 was only applicable to a voluntary winding up and not to a winding up by the court, it must necessarily be inapplicable to the present winding up.

The last section which counsel for the applicants relied on was section 251(3) of the Companies Ordinance. Section 251(1) provided that when an order was made for a winding up subject to supervision, the court might by that or any subsequent order appoint an additional liquidator. Section 251(3) read: "The court may remove any liquidator so appointed by the court or any liquidator continued under the supervision order and fill any vacancy occasioned by the removal or by death or registration." The phrase "any liquidator so appointed by the court" must refer to the appointment of an additional liquidator under section 251(1). The present liquidators were not additional liquidators appointed under section 251(1). The only other liquidator covered by section 251(3) was one whose appointment was continued under the supervision order. The previous liquidators of the company were Yap Hong Thin and V. Kandiah who were substi-

* [1966] 1 M.L.J. 33.

tuted by the present liquidators by the order of the court dated 28th May, 1962. So the present liquidators were appointed at the time when the court ordered that the voluntary winding up of the company was to be continued but subject to the supervision of the court and they were not liquidators whose services were continued by that order. Therefore, section 251(3) had no application to the present liquidation.

The present liquidators cannot be removed by an order of the court under any provision of the Companies Ordinance, 1940-1946.

The only other prayer which remains is for the appointment of an additional liquidator. Section 251(1) of the Companies Ordinance provided that "Where an order is made for a winding up subject to supervision, the court may by that or any subsequent order appoint an additional liquidator." That section conferred a discretionary power on the court, the exercise of which must depend on the merits of each case. In the present application, the liquidation had been completed to all intents and purposes. All the claims had been dealt with by the present liquidators and the verified claimants had been paid. The first and final dividend was in fact declared in August 1964, more than a year before the applicants took out the present application. In the circumstances, no useful purpose can be served by the appointment of an additional liquidator.

As to the question of costs, the company now has no assets. No order as to costs.

Application refused.

Solicitors: *N. Sharma; Shearn, Delamore & Co.*

AHMAD BIN UDOH & ANOR. v. NG AIK CHONG

[A.C.J. (Wan Suleiman J.) May 17, 1969]
[Alor Star — Civil Appeal No. 3 of 1968]

Contract — Illegal agreement — Frustration of contract — Whether party to it entitled to recovery of money paid under the agreement — Contracts (Malay States) Ordinance, 1950, s. 66.

The respondent entered into an agreement with the appellants for a lease of padi land for a period of six years. Pursuant to the agreement, a sum of $1,500 was paid to the appellants. The appellants subsequently refused to allow the respondent to till the land.

In an action for the recovery of the sum paid under the agreement, the Sessions Court gave judgment in favour of the respondent. On appeal from that decision the appellants raised a ground which was not pleaded in the court below — i.e., that the agreement was illegal for contravening section 3(1) of the Padi Cultivators Ordinance, and the sum paid under the illegal agreement was not recoverable by the respondent.

Held, dismissing the appeal: (1) in English law, money paid in consideration of an illegal purpose which is not accomplished is not recoverable unless, the scheme is frustrated by reason of the plaintiff's repentence. Under section 66 of the Contracts (Malay States) Ordinance, 1950, all that need be proved is that the illegal purpose has not been achieved;

(2) the agreement was one which came within the ambit of the words "if discovered to be void" in section 66 of the Ordinance. The respondent, was therefore entitled to the refund of the money paid under the illegal agreement.

Cases referred to:—

(1) *Snell* v. *Unity Finance Ltd.* [1963] 3 All E.R. 50.

(2) *Bigos* v. *Bousted* [1951] 1 All E.R. 92.

(3) *Harmath Kaur* v. *Inder Singh* (1922), L.R. 50 I.A. 69.

CIVIL APPEAL.

R.C. Murugeson for the appellants.

Karpal Singh for the respondent.

Cur. Adv. Vult.

Wan Suleiman J.: The appellants/defendants are, according to the statement of claim and in their testimony before the Sessions Court, the registered proprietors of lands held under S.P. Nos. 15408 and 24189, Mukim Tajar.

According to the respondent/plaintiff by an agreement dated the 12th of March, 1965 entered into between him and the defendants/appellants, the latter agreed to lease two pieces of land for a period of six years at a rental of $250 per annum commencing from the padi season in 1965, upon the execution of which agreement the plaintiff/respondent paid to the appellants the sum of $1,500 the agreed rental for the period of six years. In May 1965 the respondent asked one Baharom to plough the land for him. Baharom was prevented from working on the land by the first appellant.

The respondent subsequently tried to persuade the appellants to allow him to till the land without success and this action was brought to obtain the refund of the sum of $1,500 which the respondent claimed he paid to the appellants.

The learned Senior President on considering the statement of defence rightly, in my opinion, held that there had been non-compliance with Order 10 rule 4(a) & (b) (which pertains to pleadings) of the Subordinate Courts Rules, 1950. In consequence the appellants/defendants were precluded from defending the claim under Order 10 rule 7 of the Subordinate Courts Rules and the court struck off the defence under Order 36 rule 14(a), and after taking the plaintiff's evidence the Senior President gave judgment in his favour for the sum of $1,500 and costs.